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IN THE

Supreme Court of the United States

October Term, 1971
No. .....

71-1231

DEAN FRANCIS PACE,

Petitioner,

vs.

MARION ELENA PACE,

Respondent.

Petition for a Writ of Certiorari to the California Supreme Court.

DEAN FRANCIS PACE,
1900 Avenue of the Stars,
Los Angeles, Calif. 90067,
Petitioner.

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DEAN FRANCIS PACE,

Petitioner,

vs.

MARION ELENA PACE,

Respondent.

Petition for a Writ of Certiorari to the California Supreme Court.

Petitioner, Dean Francis Pace, prays that a writ of certiorari issue to review the order of the California Supreme Court, entered in the above case on December 29, 1971.

Citations to Opinions Below.

There never has been an opinion by any Court. The petition to this Court is predicated upon the following order transmitted to Petitioner by postcard, as yet unreported:

Order of the California Supreme Court, entered on December 29, 1971, to wit: "Hearing Denied."

Jurisdiction.

The order of the California Supreme Court was made on and entered on December 29, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. Section 2101(c).

Questions Presented.

1. Is the California Family Law, Civil Code Sections 4506-4509, unconstitutional *per se* and as applied, in violation of the Due Process and Equal Protection clauses of the Fourteenth Amendment to the United States Constitution?

2. Does The United States Supreme Court decision in *National Union v. Arnold,* 348 U.S. 37 (1954), extend:

a. To family law: dissolution of marriage, family and community property?

b. To an incomplete hearing where the judgment was rendered void *after* trial?

c. To denial by a state of any appeal of a contempt conviction, whereas in *National Union v. Arnold,* 348 U.S. 37 (1954), there was an appeal, hearing and opinion by the State Supreme Court?

d. To force a marital partner to violate an injunction, or to bankrupt the community, in order to obviate the filing of a supersedas bond?

e. To denial of appeals on multiple causes of dissolution of marriage and custody as a result of contempt on an unrelated community property cause?

3. Does the concept of "petty offense", defined by the United States Supreme Court in *Cheff v. Schnackenberg,* 384 U.S. 373 (1966), extend to family law, so that the convicted is placed in jeopardy of imprisonment, and the loss of his marriage, family and community property, without trial by jury?

4. Did the Commissioner who presided at the OSC re Contempt hearing lack jurisdiction and deny adjective due process within the prohibitions of the United

States and California Constitutions, so as to render the contempt conviction void?

a. Did the Commissioner lack jurisdiction to preside at the OSC re Contempt Hearing under California Constitution Article VI, Section 21?

b. Was the interlocutory judgment, which the Commissioner enforced by contempt, was void under California law for his errors that arose *after* trial?

c. Was the Commissioner an "unbiased judge?"

d. Did the Commissioner deny the right to confrontation?

e. Did the Commissioner deny the accused time for preparation of his defense?

f. Did the Commissioner violate the prohibition against imprisonment for debt?

5. Did the California Court of Appeal lack jurisdiction and deny adjective due process within the prohibitions of the Fourteenth Amendment to the United States Constitution, whereby:

a. The contempt conviction was then pending in the trial court?

b. No trial court record whatsoever had been certified to the Court of Appeal, so that it ruled on contested hearsay contained only in an appellate brief?

c. "Appeals" were dismissed without identification or limitation?

Constitutions, Statutes and Rules Involved.

The United States Constitution provisions involved are the Sixth and Fourteenth Amendments. The California Constitution provisions involved are Article I, Section 15, and Article VI, Section 21. The California

Statutes involved are California Civil Code Sections 4506-4509, and California Code of Civil Procedure, Section 1222. The California Rules of Court involved are Rules 23, 41, and 232. These provisions are printed in Appendix A hereto, beginning at Page 1.

Statement of the Case.

On November 24, 1970, a petition was filed by Marion Elena Pace in the Superior Court in and for the County of Los Angeles, California, Case Number D 779053, for dissolution of marriage pursuant to California Civil Code Section 4506(1).

On June 3, 1971 an interlocutory hearing was held before Commissioner James N. Reese, of said Superior Court. An interlocutory judgment of dissolution of marriage was entered on June 17, 1971 to adjudicate (1) dissolution of the marriage, (2) custody, (3) support, (4) community property, (5) attorneys fees, and (6) costs. On July 19, 1971, Petitioner filed notice of appeal of said interlocutory judgment.

On July 19, 1971, a OSC re Contempt hearing was held before Commissioner James N. Reese of said Superior Court; Petitioner was found guilty of contempt on three counts, to wit: (1) failure to pay forthwith the sum of $2,200 to William E. Walkup, the father of Respondent, (2) $1,000 in additional attorneys fees, and (3) $317.68 in costs. Thereupon, Commissioner Reese sentenced Petitioner "to serve on each count five days in the county jail, said days to all run consecutively, for a total of 15 days," and fined Petitioner $1,500. Appeal was filed by Petitioner on July 20, 1971.

Writs of habeas corpus were denied by the California Court of Appeal on July 29, 1971, and by the

California Supreme Court on August 13, 1971. A Writ of Certiorari was denied by the California Court of Appeal on August 30, 1971.

On August 30, 1971, Petitioner filed and appeared before Judge J. Wesley Reed in said Superior Court on his Motion to Set Aside and OSC re Modification of the interlocutory judgment. Judge Reed denied all motions, without hearing, on the grounds that the judgment had been appealed and that Petitioner was in contempt. Thereupon, Judge Reed forthwith executed sentence, and Petitioner was confined to jail for five days, from August 30, 1971 through September 3, 1971, when Judge Reed "on the Court's own motion" restored the matter to the calendar and had Petitioner returned the court from the county jail. Judge Reed then suspended the remaining ten days of the contempt sentence until November 3, 1971, in order for Petitioner to use his best efforts to earn sufficient funds to pay all obligations and to obey all judgment and orders. On the Court's own motion, the November 3, 1971 hearing was continued to November 15, 1971, whereupon, *inter alia,* Judge Reed ordered:

> Execution of the remaining sentence for contempt for the term of ten days is indefinitely stayed, the Court finding that the respondent has made a good faith effort to comply with the Court's order.

The orders of said Superior Court, dated August 30, 1971, September 3, 1971, and November 15-16, 1971 have all been appealed by Petitioner.

Meanwhile, on September 24, 1971, Respondent filed "Notice of Motion to Dismiss on Appeal" in the California Court of Appeal, Second Appellate District,

set for November 4, 1971. The motion was granted on November 4, 1971 by postcard notice stamped: "Motion Granted: Appeal Dismissed"; followed on November 16, 1971, by a *nunc pro tunc* order, to wit: "Motion to Dismiss Appeals Granted: Appeals Dismissed." On December 6, 1971, said Court of Appeal ruled by postcard: "The Court: Request for findings on appeal denied." On December 14, 1971, Petitioner filed a Petition for Hearing in the California Supreme Court, which denied the Petition by postcard notice dated December 29, 1971, stamped: "Hearing Denied." Said orders of the California Supreme Court and Court of Appeal are printed in Appendix B, hereto beginning at Page 1.

The Clerk of the California Court of Appeal, Second Appellate District, filed a remittitur on January 5, 1972, with the Clerk of the Superior Court in and for the County of Los Angeles, California, whereby the appeals by Petitioner, Dean Francis Pace, from the interlocutory judgment, entered June 17, 1971, and the contempt of court order, dated July 19, 1971, are dismissed.

The instant Petition for a Writ of Certiorari relates solely to the "Motion to Dismiss an Appeal" granted by the California Court of Appeal, Second Appellate District, and not to the merits of the six appeals from the interlocutory judgment and subsequent orders by the Superior Court in and for the County of Los Angeles, California.

Federal Questions Raised in Pleadings.

In order to comply with Rule 23.4 of this Court, Petitioner cites the federal questions raised in the headings of his Petition for Hearing to the California Supreme Court, pending certification of the record to this Court.

At line 17, page 2: "The Court of Appeal Denied Due Process in Its Dismissal of 'Appeals.'"

At lines 7-8, page 3: "Denial of Due Process by The Use of A Criminal Conviction as a Sanction to Deprive the Criminal of a Civil Appeal."

At lines 24-25, page 9 "The Superior Court lacked jurisdiction by violation of the Fifth and Fourteenth Amendments to the United States Constitution, and Article I, Section 3 of the Constitution of the State of California;" with subheadings to wit: "Confrontation," "Time to Prepare Defense," "Privilege Against Self-Incrimination," and "Adjective Due Process."

At lines 5-6, page 14: "California Civil Code, Section 4506, *et seq.* is Unconstitutional Per Se And As Applied in Pace v. Pace, D 779053."

The constitutionality of the California Family Law, *per se* and as applied, has been consistently attacked, beginning with a motion to dismiss for lack of jurisdiction denied at the interlocutory hearing on June 3, 1971, by the Superior Court in and for the County of Los Angeles, California.

REASONS FOR GRANTING THE WRIT.

1. California Civil Code Sections 4506-4509 Are Unconstitutional Per Se and as Applied, in Violation of the Fourteenth Amendment to the United States Constitution.

Marriage and divorce are within the Police Power of the State, subject, however, to the United States Constitution, *Loving v. Virginia,* 388 U.S. 1 (1966).

In May 1966, California Governor Edmund G. Brown established a commission to begin "a concerted assault on the high incidence of divorce in our society and its often tragic consequences." The result was the Family Law Act of 1969, California Civil Code 4600 *et seq.*, which became effective on January 1, 1970. Far from alleviating "the high incidence of divorce", the new California law has made the "tragic consequences" of divorce more acute. During the first year of the new liberal divorce law, divorces in California rose 39.02 percent. The State Department of Health reported 114,000 divorces in 1970, up sharply from the 82,000 recorded in 1969. The Los Angeles County Marriage Records Bureau confirmed the precipitous rise in divorces filed and final divorce judgments granted after a relative plateau during the preceding years.

Year	Divorces Filed	Final Judgments
1968	39,539	26,513
1969	39,465	28,704
1970	45,681	39,664

In Los Angeles County alone, the Marriage Records Bureau reports that 58,581 children were involved in

the 39,664 divorces granted in 1970. The impact of divorce on the children is emphasized in the Los Angeles Conciliation Court brochure.

> It is a distressing fact that 74% of all young people in Juvenile Hall are the product of homes broken by the dissolution of marriage.

Not only are crime, delinquency and insurrection prevalent among youth today, but the social and economic stresses are emphasized by the Los Angeles Conciliation Court in regard to both divorce and remarriage.

> As a result, in nearly three-fourths of all dissolutions the wife must seek employment to help support herself and the children. The husband does not earn enough to pay all the bills for two homes. When the wife works during the formative years of children, they are either neglected or reared under the guidance of strangers. Remarriage is not only difficult, but the problems a person runs away from in one marriage haunt him in the next. Other complications are added; for example, the wife's new husband may resent secretly or openly contributing to the support of another man's children; quarrels may arise when he attempts to discipline them; children born to the new union become embroiled in accusations of favoritism which may keep the family in turmoil . . . The percentage of second-marriage failures where children are involved is high.

The sociological school of jurisprudence which pervades the decisions of the United States Supreme Court may be succinctly stated to be: the greatest good

for the greatest number consistent with the social interest. The California Legislature apparently considered that the greatest good for the greatest number is to concede that divorce is inevitable, and consequently, to make divorce available as painlessly as possible and without fault. Is that concession, however, consistent with the social interest whereby the family is "the foundation of society"?

The problem created by liberal divorce law is still more insidious. If a state, as California, makes divorce available simply for the asking, the motivation for husband and wife to work at a successful marriage is lost; on the contrary, the incentive is to use the liberal California divorce law for convenience, experimentation, adventure, promiscuity or whatever, so that marriage becomes a charade for the adventurers and a millstone for the children.

a. The California Divorce Law Is Vague and Standardless.

The Due Process Clause of the Fourteenth Amendment to the United States Constitution, and through it, Article I, Section 3 of the Constitution of the State of California, requires that a state statute have a "legally fixed standard" of conduct. The *Attorney's Guide to Family Law Act Practice,* California Continuing Education of the Bar, 1970, authored by Judges M. A. Freeman, W. P. Hogoboom, W. E. MacFaden and L. E. Olsen of the Superior Court, states at Section 2.2:

> Six of the seven grounds previously set forth in CC 92 (adultery, extreme cruelty, willful desertion, willful neglect, habitual intemperance, and conviction of a felony) have been eliminated and the new ground of irreconcilable differences has been substituted . . . the seventh former ground (incurable insanity) is retained but the requirements have been reduced . . .

California Civil Code Section 4507 (set forth in Appendix A hereto) legislates a "standardless" definition of irreconcilable differences as "those grounds which are determined by the court to be substantial reasons for not continuing the marriage and which make it appear that the marriage should be dissolved." That definition "leaves judges and jurors free to decide, without any legally fixed standards", as further manifested in California Civil Code, Section 4509 (set forth in Appendix A hereto), which provides that "evidence of specific acts of misconduct shall be improper and inadmissible." The Judges of the Superior Court added emphasis in the *Attorney's Guide to Family Law Act Practice, supra* at 2.28:

> The view propounded in Assembly J, Aug. 8, 1969, P 8058, was that the law is based on the status of the marriage, and that *apparently the only proof needed for dissolution, even if one party wishes to continue the marriage, is that the other party refuses.*
>
> For example, absolute refusal on the part of one spouse to live with the other, despite a conciliatory attitude and effort on the part of the latter, was thought by the great majority of the legislators and witnesses considering the question to be a sufficient reason for dissolution. In that situation the court could hardly justify a refusal to grant an order of dissolution since the marriage certainly has broken down. Refusal would amount to a legal perpetuation of (a) relationship which ceased to exist in fact (emphasis added).

California has made divorce so automatic that the prevalent attitude among the Bar is: why bother to

contest it? Prior to the 1970 Family Law Act, the California Supreme Court consistently held that the court has no power to grant a wife a divorce unless she proved grounds therefor. *Wisely v. Wisely,* 178 Cal. App. 2d 181; 2 Cal. Rptr. 886 (1960).

The vagueness of the California Civil Code Sections 4506-4509, is aggravated in that it inhibits the exercise of the freedoms and liberties "to marry, establish a home and bring up children," *Meyer v. Nebraska,* 262 U.S. 390, 399 (1923), guaranteed by the Fourteenth Amendment. The vice of unconstitutional vagueness is aggravated where the statute in question operates to inhibit the exercise of individual freedoms affirmatively guaranteed by the Federal Constitution. *Baggett v. Bullit,* 377 U.S. 360, 372 (1964).

Respondent, Marion Elena Pace, in the instant case, deserted on November 13, 1970. As evidence that grounds for divorce did not exist, Respondent, who is represented by one of the largest law firms in Los Angeles, did not avail herself of California Civil Code Section 5102 (set forth in Appendix A), to wit:

> . . . the court may order the temporary exclusion of either party from the family dwelling or from the dwelling of the other upon a showing that physical or emotional harm would otherwise result, until the final determination of the proceeding.

Instead, Respondent took the extraordinary step of disrupting her six months old child and deserting while Petitioner was on a business trip in Washington, D.C. Respondent deserted and now seeks divorce under the liberal California law, which allows divorce without ground or standard.

b. The California Divorce Law Abridges Guaranteed Liberties.

In regard to whether a state "statute as construed and applied unreasonably infringes the liberty guaranteed by the Fourteenth Amendment", the Court held in *Meyer v. Nebraska, supra* at 399:

> Without doubt it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, *to marry, establish a home and bring up children,* to worship God according to the dictates of his own conscience and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men (emphasis added).

The United States Supreme Court has recognized that the Fourteenth Amendment guarantees not only the right to marry but also the right to "establish a home and bring up children." California, by the state action of the legislature and the courts, destroys not only the marriage but the home and the right to bring up children.

c. The California Divorce Law Denies Equal Protection of the Law.

The Equal Protection clause of the Fourteenth Amendment to the United States Constitution, and through it, Article I, Section 3 of the Constitution of the State of California, extends to all state action denying equal protection of the laws, whatever agency of the state takes the action or whatever the guise in which the state action is taken.

> The command of the Fourteenth Amendment is that no "State" shall deny to any person within its

> jurisdiction the equal protection of the laws. "A State acts by its legislative, its executive, or its judicial authorities. It can act in no other way. The constitutional provision, therefore, must mean that no agency by whom its powers are exerted, shall deny to any person within its jurisdiction the equal protection of the laws. *Cooper v. Aaron,* 358 U.S. 1, 16-17 (1958).

California Civil Code Sections 4506-4509, discriminate against a marital party in that it takes away not only his marriage but also his liberty to "establish a home and bring up children" recognized by the United States Supreme Court in *Meyer v. Nebraska, supra* at 399. State action has deprived Petitioner of his home and the liberty to bring up his child. Thus state action has disrupted not only the marital relation economically and socially, but of greater importance, the family institution dedicated to the welfare and education of children.

> In determining whether or not a state law violates the equal protection clause, the Supreme Court must consider the facts and circumstances of the law, the interests which the state claims to be protecting, and the interests of those who are disadvantaged by the classification. *Williams v. Rhodes,* 393 U.S. 23, 30 (1968).

If the state concedes that divorce is inevitable, then the legislative purpose may be valid in making divorce available automatically, painlessly and without fault. In doing so, however, the state discriminates against husbands, within the class of marital partners threat-

ened with divorce, who treasure family life, the home, the love, care and welfare of their children. The children, within the class of helpless victims of divorce actions, are discriminated against in the deprivation of the parent who is devoted to the home, the love, care and welfare of his child. Petitioner urges that it is not constitutionally sufficient to hold that the only legislative alternatives in California are (1) two separate households, or (2) mandatory custody in the mother, in light of the liberty of the father to "establish a home and bring up children" recognized in *Meyer v. Nebraska, supra* at 399. Suffice it to say that a father can hardly "establish a home and bring up children" alone.

d. Action by the United States Supreme Court.

It may be accurately contended, that if this Court should sustain the contention that the California Divorce Law is unconstitutional, the legal status of all dissolved marriages since January 1, 1970 would be placed in doubt. Petitioner respectfully urges that this Court adopt a policy comparable to the segregation decision in *Brown v. Board of Education,* 349 U.S. 294 (1954), only applicable to future contested divorce cases. Thereby, defaulted divorce actions would serve the interests of those in need, as well as those interested in convenience, experimentation, adventure, or whatever. Then let the California State Legislature establish constitutional standards or grounds for contested divorces.

2. The United States Supreme Court Decision in National Union v. Arnold, 348 U.S. 37 (1954), Should Not Extend to Family Law Per Se and as Applied.

a. *Relevance to Family Law. National Union v. Arnold,* 348 U.S. 37 (1954) involved judgment of a dollar amount certain, and not the dynamic, evolving nature of marital relationship, even after divorce. Matters of custody, support, attorneys fee, and costs are under the continuing jurisdiction of the courts. In the instant case, the California Court of Appeal dismissed all appeals without identification or limitation in time. Moreover, the trial court by order dated November 16, 1971 "indefinitely stayed" execution of the remaining sentence for contempt. Thus, Petitioner has been effectively deprived of access to the courts forever.

b. *Incomplete Hearing. National Union v. Arnold,* distinguished *Hovey v. Elliott,* 167 U.S. 409 (1897), where the defendant was deprived unjustly of a hearing on the theory that he was guilty of contempt. The term "hearing" should extend to the filing and entry of the judgment. In the instant case, Petitioner urges (at paragraph 4, b, pages 18-22, herein) that there was a *prima facie* violation of the California Rules of Court, Rule 232 (set forth in Appendix A herein) so as to render the judgment void, and consequently, the "hearing" incomplete.

c. *Denial of Contempt Appeal.* In *National Union v. Arnold,* there was an appeal, hearing and opinion by the State Supreme Court. California Code of Civil

Procedure, Section 1222 (set forth in Appendix A, herein) renders all contempt convictions "final and conclusive" so that there is no appeal even where there are allegations that the trial Commissioner denied adjective due process and constitutional rights (as argued in paragraph 4, pages 16-29 herein).

d. *Inability to file a Supersedeas Bond. National Union v. Arnold* established the condition of filing a supersedeas bond in order to avoid dismissal of appeal. California requires a bond of one and one-half times the amount of the judgment appealed. At the time of the OSC re Contempt hearing to the present, Petitioner never has had the ability to post a supersedeas bond. His only recourse would have been bankruptcy; moreover, all of his financial resources were restrained by an ex parte injunction issued on July 14, 1971, by the Superior Court for the County of Los Angeles, California, and still in full force and affect.

e. *Denial of multiple causes of action. National Union v. Arnold* involved a judgment for a dollar amount certain. The instant case involved: (1) dissolution of marriage, (2) custody, (3) support, (4) community property, (5) attorneys fees, and (6) court costs, all of which could be separate causes of action under California law. The contempt involved one community debt, to the father of Respondent, attorneys fees and costs. To deprive Petitioner all access to the court in perpetuity for contempt, would be a significant extention of *National Union v. Arnold,* 348 U.S. 37 (1954).

3. The Concept of "Petty Offense" Should Not Extend to Imprisonment, and the Loss of Marriage, Family and Community Property, Without Trial by Jury.

In *Cheff v. Schnackenberg*, 384 U.S. 373 (1966), this Court defined "petty offense" as six months imprisonment. In the instant case, the contempt sentence was 15 days imprisonment; nevertheless, Petitioner urges the rationale of Mr. Justice Black, dissenting in *National Union v. Arnold, supra* at 46, wherein he wrote that "dismissal was punishment." If a state extends punishment for the "petty offense" of contempt to dismissal in a family law action, the marital partner should have the protection of trial by jury, to prevent the due process abridgements argued in paragraph 4, pages 16-29 herein.

4. The Commissioner Who Presided at the OSC Re Contempt Hearing, Lacked Jurisdiction and Denied Adjective Due Process Within the Prohibitions of the United States and California Constitutions.

Commissioner James N. Reese, Department 2-G, Superior Court in and for the County of Los Angeles, California, presided at both the interlocutory hearing on June 3, 1971, and the OSC re Contempt Hearing on July 19, 1971.

a. Commissioner Lacked Jurisdiction to Preside at the OSC Re Contempt Hearing Under California Constitution Article VI, Section 21.

California Constitution Article VI, Section 21 (set forth in Appendix A hereto) provides that there must be a written stipulation of the parties in order for a "temporary judge" (commissioner) to preside at a civil or criminal trial. *People v. Tijerina*, 1 Cal.3d 41, 49, 459 P. 2d 680 (1969). Petitioner herein, Respondent

at the OSC re Contempt Hearing on July 19, 1971, refused to so stipulate; the objection was acknowledged by opposing counsel, Latham and Watkins, in a pleading filed for hearing on November 15, 1971, to wit:

> At 8:30 A.M. on July 19, 1971, I appeared in Department 2-G for the scheduled hearings. At that time, Respondent *refused to sign* the appropriate documents necessary so that Commissioner Reese could hear the matter. The case was therefore returned to Department 2, where Judge Hogoboom, after requesting that Respondent state his position with respect to Commissioner Reese, *ordered* the parties back to Department 2-G for hearings on the Orders to Show Cause (emphasis added).

Commissioner Reese proceeded with the OSC re Contempt hearing on July 19, 1971 with full knowledge that Petitioner herein, had refused to stipulate in writing to a judge *pro tem.* as required by the California Constitution. A question remains whether Commissioner Reese derived jurisdiction on July 19, 1971 from the stipulation signed for the interlocutory hearing on June 3, 1971. The California Court of Appeal has held that contempt is essentially punitive and separate from the cause out of which it arises. *In re Gould,* 195 Cal. App. 2d 172, 15 Cal. Rptr. 326 (1961).

b. The Interlocutory Judgment, Which the Commissioner Enforced by Contempt, Was Void Under California Law for His Errors That Arose After Trial.

Petitioner urges that the interlocutory judgment, which the Commissioner enforced by contempt, was premature, prejudicial and void within the meaning of *Estate of Cooper,* 11 Cal. App. 3d 1114, 98 Cal. Rptr.

283 (1970), and California Rule of Court 232(h) (set forth in Appendix A). The dissolution of marriage proceedings below were tried by Commissioner James N. Reese, Department 2-G, without jury on June 3, 1971. On Friday, June 11, 1971, counsel for Respondent, transmitted a proposed interlocutory judgment to Commissioner Reese, with a copy to Petitioner, received on Monday June 14, 1971. On Tuesday, June 15, 1971, Commissioner Reese issued a *nunc pro tunc* order, signed and filed the interlocutory judgment, which was entered by the Clerk on Thursday, June 17, 1971.

Commissioner Reese precluded time (10 days) for objections to the interlocutory judgment as provided in California Rule of Court 232(h):

> Any party affected by the judgment may, within 10 days *after* service of the proposed judgment on him, serve and file objections thereto. The court *shall*, within 10 days *after* expiration of the time for filing objections to the proposed judgment or, if a hearing is held, within 10 days after such hearing, sign and file its judgment (emphasis added).

So premature was Commissioner Reese that he signed and filed his interlocutory judgment in two business days (four elapsed days) after it was mailed. Thereby, Commissioner Reese placed the heavy burden upon Petitioner (a burden which Commissioner Reese knew Petitioner could ill afford) not only to prove violation of California Rules of Court, Rule 232(h) but to prove prejudice within the meaning of *Estate of Cooper, supra* at 1121:

> While a Rule of Court phrased in mandatory language is generally binding on the courts and

parties as a procedural statute, it is seldom jurisdictional and ordinarily departure from it is not reversible error *unless prejudice* is shown (emphasis added).

Departure from California Rule of Court 232(h) is evident on the face of the interlocutory judgment and the record; specifically, the proposed judgment was mailed on Friday, June 11, 1971, signed and filed by the Court four (4) days later on Tuesday, June 15, 1971, and entered by the Clerk six (6) days later on June 17, 1971. The interlocutory judgment, therefore, was signed and filed prematurely under California Rule of Court 232(h) and Section 664 of the Code of Civil Procedure; moreover, it gravely prejudiced petitioner herein, to wit:

Alteration of Community Property Stipulation. A judgment of the Court changing a stipulation accepted in open Court is a violation of California law. 6 Cal. Practice 43:5 (1968); *Estate of Howe,* 88 Cal.App.2d 454, 458, 199 P. 2d 59 (1948).

The interlocutory judgment, which Commissioner Reese knowingly signed and filed, altered *ex parte* the community property stipulation by the addition of the words: "corporations that have not yet issued any securities." (lines 25-26 at page 3 of the interlocutory judgment). No agreement in the stipulation was made that the corporations had not issued securities; that alteration was new, contested and technically incorrect, in that the California Commissioner of Corporations had granted permits for issuance of securities pursuant to Subdivision (h) of Section 25102 of the California Corporations Code in 1969 and 1970.

A second *ex parte* alteration of the stipulation (last two lines at page 3 of the interlocutory judgment) was $5,500 as the separate property of Petitioner.

A third *ex parte* alteration of the stipulation (lines 20-23 at page 4 of the interlocutory judgment) was introduced, to wit:

> Pursuant to *stipulation*, and in order to provide for the support and *benefit of respondent* and the minor child of the parties, the court also makes the following awards and orders:

One of the "following awards and orders" (lines 8-10 at page 5 of the interlocutory judgment) was payment of $2,200 forthwith to William E. Walkup, the father of Respondent. The *ex parte* attempt by Commissioner Reese to tie the $2,200 payable to William E. Walkup to the "benefit of respondent," Petitioner herein, was erroneous and reprehensible. None of the "following awards and orders" provided "for the support and benefit of respondent." In charity, one may attribute that defective judgment to oversight or negligence, were it not for the fact that Commissioner Reese willfully and deliberately relied upon that altered stipulation to sentence Petitioner to prison for contempt (the ultimate in prejudice).

Of significant importance is the *ex parte* alteration of the stipulation into six "stipulations" instead of one integrated stipulation as it was derived and read in open Court by opposing counsel, Bruce R. Lederman Esq. of Latham and Watkins himself. Thereby, the Court bootstraped its isolation of the $2,200 debt to William E. Walkup for a contempt citation and imprisonment (again the ultimate in prejudice).

c. The Commissioner Was Not an "Unbiased Judge."

The United States Supreme Court has held that a judge may be so enmeshed as to make it most appropriate for another judge to sit. Trial before "an unbiased judge" is essential to due process. *Jackson v. Mississippi,* 403 U.S. 212, 215-216 (1970); *Bloom v. Illinois,* 391 U.S. 194, 205 (1967).

At the July 19, 1971 OSC re Contempt hearing, when his interlocutory judgment was challenged, Commissioner Reese became indignant, and immediately ruled before any evidence was admitted:

> "MR. PACE: Object to the question on the grounds it's irrelevant. No foundation has been laid that the order in question is a lawful order.
>
> THE COURT: The court finds it is a lawful order. What else do you wish to argue?"

Thereupon, the transcript will reflect that the Commissioner Reese continuously interrupted as witness, prosecutor, judge, and jury.

d. Denial of Right to Confrontation.

In a contempt proceeding, the accused should be entitled to be confronted by the witnesses against him. The United States Supreme Court has held:

> The Confrontation Clause of the Sixth Amendment to the United States Constitution provides that: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . ." We have held that the Fourteenth Amendment makes the guarantees of this clause obligatory upon the States. *Illinois v. Allen,* 397 U.S. 337, 338 (1969); *Pointer v. Texas,* 380 U.S. 400 (1965).

Since the original OSC re Contempt hearing on July 19, 1971, there have been five (5) hearings for which, Marion Elena Pace, petitioner below and declarant in the OSC re Contempt petition, has been summoned for one hearing, subpoenaed for another hearing, present in court before trial for the original hearing on July 19, 1971, but in all occasions was instructed by her counsel to go home and to ignore the summons and subpoena, so that the *only person present* at the five (5) hearings was opposing counsel Bruce R. Lederman, Esq., of Latham and Watkins, who acted as counsel, prosecutor and witness, in violation of American Bar Association Canon, Code DR 5-102.

The transcript of the July 19, 1971 OSC re Contempt hearing (beginning at line 18, page 19, and ending at line 2, page 22) evidence the confusion of Commissioner Reese with regard to confrontation. After denying the right of the accused to be confronted with the declarant, Marion Elena Pace, in the OSC re Contempt trial, Commissioner Reese ruled:

> THE COURT: No. You don't have the right; not on a motion. This is a motion.
>
> If you have subpoenaed her, you have the right.
>
> You see, counsel, in a motion, it is not necessary that the court hear any evidence. It's discretionary. Either one of the parties, the moving party or the responding party, can submit their case based upon the declarations in writing.
>
> You could have filed a counteraffidavit, if you wish, and not testified and not been here.
>
> You can make a motion without any testimony whatsoever.
>
> MR. PACE: So, by a declaration—
>
> THE COURT: This is not a trial and—

MR. PACE: The opposing party can enter hearsay, inadmissible evidence, and in a criminal matter—

THE COURT: You have a right to object to it.

MR. PACE: I do object to it.

THE COURT: You can object specifically—

MR. PACE: I object to the entire declaration of Marion Elena Pace.

THE COURT: Upon what grounds?

MR. PACE: That it's hearsay.

THE COURT: Which portion is hearsay?

MR. PACE: The entire matter is hearsay unless I have a right to cross-examine.

Commissioner Reese concluded (at lines 5-6, page 23 of the transcript): "It will be overruled and the court is not entertaining any further argument."

The misconception of Commissioner Reese, that a OSC re Contempt proceeding is a "motion" and "is not a trial", conflicts with the decisions of this Court in *Bloom v. Illinois,* 391 U.S. 194, 205 (1967) citing *Cook v. United States,* 267 U.S. 517, 537 (1925):

> Due process of law, therefore, in the prosecution of contempt, except that committed in open court, requires that the accused should be advised of the charges and have a *reasonable opportunity to meet them by way of defense or explanation.* We think this includes the assistance of counsel, if requested, and the *right to call witnesses to give testimony,* relevant to either the issue of complete *exculpation* or in *extenuation* of the offense and in *mitigation* of the penalty to be imposed (emphasis added).

e. Time to Prepare Defense.

On July 19, 1971, Commissioner Reese denied a motion by Petitioner to continue the contempt proceeding until the return of the Superior Court reporter, Alvin Henry C.S.R., who was on vacation from July 2, 1971 (the day of the OSC re Contempt was filed) to August 2, 1971, in order that Petitioner could obtain a transcript of the stipulation made in open court at the interlocutory hearing on June 3, 1971, to prepare his defense that the stipulation has been altered to his prejudice, and consequently, the interlocutory judgment was prejudicial, premature and void. Petitioner should have the right to adequate time to prepare a defense and to obtain evidence necessary to a defense. *Bloom v. Illinois,* 391 U.S. 194, 205 (1967).

f. Prohibition Against Imprisonment for Debt.

"If the obligation sought to be enforced is contractual and negotiated, as distinguished from marital and imposed by law, even though the contract relates to marriage obligations," the enforcement of debt payments by contempt proceedings is forbidden by California Constitution, Article I, Section 15; *Bradley v. Superior Court,* 48 Cal.2d 509, 310 P. 2d 634, (1957); *Plumer v. Superior Court,* 50 Cal.2d 631, 326 P.2d 193 (1958). The debt of $2,200 to William E. Walkup was "contractual and negotiated"; there was never a demand for payment, even during his testimony at the interlocutory hearing on June 3, 1971, eighteen months after the debt was contracted. William E. Walkup is not an attorney, but is the father of Marion Elena (Walkup) Pace, petitioner in the dissolution action, and Chairman of the Board of Signal Companies, one of the largest clients of Latham and Watkins, counsel for Respondent.

5. The California Court of Appeal Lacked Jurisdiction and Denied Adjective Due Process Within the Prohibitions of the Fourteenth Amendment to the United States Constitution.

Of the six appeals filed by Petitioner from the interlocutory judgment and subsequent orders of the Superior Court in and for the County of Los Angeles, California, four appeals were pending when the Court of Appeal, Second Appellate District, took a "Motion to Dismiss an *Appeal*" under submission on November 4, 1971, and on the same day, filed a postcard rubber stamped: "Motion Granted: Appeal Dismissed." When this petitioner inquired of the Clerk of the Court of Appeal, which "appeal" was dismissed, he was rewarded for his efforts by a *nunc pro tunc* order which simply read: "Motion to Dismiss *Appeals* Granted; *Appeals* Dismissed." In order to permit clarification: to identify *what appeals* were dismissed and upon *what grounds* the appeals were dismissed, petitioner filed, pursuant to California Rules of Court, Rule 23 (a) (set forth in Appendix A, herein), a request for findings on appeal, which again by postcard was denied by said Court of Appeal on December 6, 1971. Said orders are printed in Appendix B.

a. *Contempt Conviction Pending in the Trial Court.* When said Court of Appeal dismissed appeals on November 4, 1971, the contempt action was still pending in the trial court, which found on November 16, 1971, that Petitioner "has made a good-faith effort to comply with the Court's order." That determination by the trial court is hardly consistent with dismissal of civil appeals for contempt, if indeed, that was the reason for the dismissal, there being no opinion by said Court of Appeal.

b. *No Certified Record.* Said Court of Appeal dismissed appeals on November 4, 1971, based upon contested hearsay contained in Respondent's appellate brief. True, the Clerk of the Superior Court had certified the contempt order, dated July 19, 1971, to said Court of Appeal, but as argued previously, the contempt action was still pending in the trial (Superior) court, which found that Petitioner "has made a good-faith effort to comply with the Court's order" on November 16, 1971.

The trial record for the OSC re Contempt hearing has never been transmitted to said Court of Appeal. The trial record for the first appeal from the interlocutory judgment was not certified to said Court of Appeal until March 8, 1972.

Petitioner earnestly urges that adjective due process should require appellate review of a contempt conviction, if said conviction is to be the basis for the dismissal of civil appeal, as distinguished from appellate review of the criminal conviction for contempt itself. In *National Union v. Arnold,* 348 U.S. 37 (1954), this Court did not reach the issue of a contempt conviction by the trial court that is "final and conclusive" by the state law: California Code of Civil Procedure, Section 1222 (set forth in Appendix A).

c. *Appeals Were Dismissed Without Identification or Limitation.* The *nunc pro tunc* order by said Court of Appeal on November 16, 1971, reads: *"Appeals Dismissed"* without identification or limitation. On December 6, 1972, said Court of Appeal denied a request for findings to identify the appeals. As a consequence, Petitioner has been denied in perpetuity, adjective due process by said Court of Appeal, which

has dismissed appeals not within its jurisdiction, and thereby, has deprived Petitioner of his right to civil appeal guaranteed by the Constitution and Statutes of the State of California. If the order of said Court of Appeal is to be taken literally, Petitioner shall forever be at the mercy of the California family law trial courts.

Conclusion.

Petitioner earnestly pleads, on behalf of the social interest, that this Honorable Court restore the rule of law, not of men, to Family Law in the State of California.

Dated: March 24, 1972.

Respectfully submitted,

DEAN FRANCIS PACE,
Petitioner.

APPENDIX "A."

Constitutions Involved in This Proceeding.

1. United States Constitution, Sixth Amendment, U.S.C.A. Const., provides in pertinent part:

"In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . ."

2. United States Constitution, Fourteenth Amendment, U.S.C.A. Const., provides in pertinent part:

". . . nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction, the equal protection of the laws."

3. California Constitution, Article I, Section 15, West's Annotated California Codes, Cal. Const., Art. 1-4 (1954), provides:

"Sec. 15. No person shall be imprisoned for debt in any civil action, on mesne or final process, unless in cases of fraud, nor in civil actions for torts, except in cases of wilful injury to person or property; and no person shall be imprisoned for a militia fine in time of peace."

4. California Constitution, Article VI, Section 21, West's Annotated California Codes, Cal. Const., Art. 5-11, Cumulative Pocket Supplement (1971) provides:

"Sec. 21. On stipulation of the parties litigant the court may order a cause to be tried by a temporary judge who is a member of the State Bar, sworn and empowered to act until final determination of the cause."

Statutes Involved in This Proceeding.

1. California Civil Code, Sections 4506-4509, West's Annotated California Codes, Volume 12A (1970), provides in pertinent part:

"§ *4506. Grounds for dissolution or legal separation*

A court may decree a dissolution of the marriage or legal separation on either of the following grounds, which shall be pleaded generally:

(1) Irreconciliable differences, which have caused the irremediable breakdown of the marriage.

(2) Incurable insanity."

"§ *4507. Irreconcilable differences defined*

Irreconcilable differences are those grounds which are determined by the court to be substantial reasons for not continuing the marriage and which make it appear that the marriage should be dissolved."

"§ *4508. Irreconcilable differences; findings; order; continuance for reconciliation; consent to legal separation*

(a) If from the evidence of the hearing and contained in the confidential questionnaire, the court finds that there are irreconcilable differences, which have caused the irremediable breakdown of the marriage, it shall order the dissolution of the marriage or a legal separation. If it appears that there is a reasonable possibility of reconciliation, the court shall continue the proceeding for a period not to exceed 30 days. During the period of the continuance, the court may make any order for the support and maintenance of the parties, the custody, support, maintenance, and education of the minor children of the marriage, attorney fees, and for the preservation of the property of the parties. At

any time after the termination of such 30-day period, either party may move for the dissolution of the marriage or a legal separation, and the court may enter its judgment decreeing such dissolution or separation.

(b) The court may not render a judgment decreeing the legal separation of the parties without the consent of both parties unless one party has not made a general appearance and the petition is one for legal separation. A judgment decreeing, the legal separation of the parties shall not bar a subsequent judgment decreeing the dissolution of the marriage rendered pursuant to a petition for dissolution filed by either party."

"§ *4509. Evidence of specific acts of misconduct*

In any pleadings or proceedings for legal separation or dissolution of marriage under this part, including depositions and discovery proceedings, evidence of specific acts of misconduct shall be improper and inadmissible, except where child custody is in issue and such evidence is relevant to that issue, or at the hearing where it is determined by the court to be necessary to establish the existence of irreconcilable differences."

2. California Civil Code, Section 5102, West's Annotated California Codes, Volume 12A, (1970), provides in pertinent part:

"Sec. 5102. *Separate Property; Dwelling.*

. . . the court may order the temporary exclusion of either party from the family dwelling or from the dwelling of the other upon a showing that physical or emotional harm would otherwise result, until the final determination of the proceeding."

3. California Code of Civil Procedure, Section 1222, West's Annotated California Codes, Volume 19 (1955), provides:

"Sec. 1222. *Conclusiveness of Judgments and Orders.*

The judgment and orders of the court or judge made in cases of contempt, are final and conclusive."

Rules of Court Involved in This Proceeding.

1. California Rules of Court, Rule 23, West's Annotated California Code, Volume 23, Part 1 (1955), provides in pertinent part:

Rule 23. Findings and Additional Evidence on Appeal

(a) [*Request for findings*] A request that the reviewing court make findings of fact shall contain a draft of the proposed findings, and may be made in a brief, or a separate application may be served and filed. If opposing counsel has not had an opportunity in his brief to object to the request he may serve and file written opposition thereto."

2. California Rules of Court, Rule 232, West's Annotated California Code, Cumulative Pocket Part, Volume 23, Part 2, (1971), provides in pertinent part:

"(h) . . . The court, in its discretion, may notify counsel for the prevailing party to prepare, serve and submit such proposed judgment to the court within 10 days after such notice. Any party affected by the judgment may, within 10 days after service of the proposed judgment on him, serve and file objections thereto.

The court shall, within 10 days after expiration of the time for filing objections to the proposed judgment or, if a hearing is held, within 10 days after such hearing, sign and file its judgment. The judgment so filed shall constitute the decision upon which judgment shall be entered pursuant to Section 664 of the Code of Civil Procedure."

APPENDIX "B."

Order of the California Supreme Court.

Clerk's Office Supreme Court
4250 State Building
San Francisco, California 94102

Dec. 29, 1971

Dear Sir: I have this day filed Order

HEARING DENIED

In re: 2 Civ. No. 39147. Pace vs. Pace.

Respectfully,

G. E. BISHEL
Clerk

Order of the California Court of Appeal, Second Appellate District.

Los Angeles, Cal. Nov. 4, 1971

TITLE: Pace vs. Pace. No. 39147.

MOTION GRANTED, APPEAL DISMISSED.

Clay Robbins, Clerk

Order of the California Court of Appeal, Second Appellate District.

In the Court of Appeal of the State of California, Second Appellate District, Division Two.

Marion Elena Pace, Petitioner and Respondent

vs.

Dean Francis Pace, Appellant. 2nd Civil 39147

SC # D 779 053

ORDER

THE COURT:

The minute order of November 4, 1971 dismissing the above entitled case is corrected "Nunc Pro Tunc" to read as follows:

Motion to Dismiss Appeals Granted; Appeals Dismissed.

Roth
Presiding Justice

Filed: Nov. 16, 1971.

Order of the California Court of Appeal, Second Appellate District.

Los Angeles, Cal. Dec. 6, 1971

TITLE: Pace vs. Pace. No. 39147.

The Court: Request for findings on appeal denied.

Clay Robbins, Clerk

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IN THE

Supreme Court of the United States

October Term, 1971
No. 71-1231

DEAN FRANCIS PACE,

Petitioner,

vs.

MARION ELENA PACE,

Respondent.

On Petition for a Writ of Certiorari to the California Supreme Court.

BRIEF FOR RESPONDENT IN OPPOSITION.

QUESTIONS PRESENTED.

1. Whether there are adequate state grounds to support the dismissal of petitioner's appeal from the Interlocutory Judgment of Dissolution of Marriage by the California Court of Appeal, Second Appellate District?

2. Whether this Court will review a state court judgment resting on two grounds, where no opinion is rendered specifying which of the two grounds the judgment is based upon and where at least one of the grounds is a state ground adequate to support the judgment?

STATEMENT OF THE CASE.

Introduction.

The instant petition for writ of certiorari relates solely to the dismissal of petitioner's ("husband's") appeal from the Interlocutory Judgment of Dissolution of Marriage (the "Interlocutory Judgment") by the California Court of Appeal, Second Appellate District ("California Appellate Court"). Respondent ("wife") moved to dismiss the husband's appeal on two grounds: (1) that the husband had waived his right to appeal from the Interlocutory Judgment because he had accepted the benefits of that judgment, and (2) that the husband could not maintain any appeal from the Interlocutory Judgment because he was in contempt of the very orders from which he appealed. This case does *not* involve the constitutionality of the Family Law Act of California, California Civil Code §§ 4500 *et seq.* This case does not involve the validity or invalidity of the husband's contempt conviction. This case does *not* involve the husband's other appeals from the Interlocutory Judgment and subsequent orders of the Superior Court in and for the County of Los Angeles. Those issues were not decided or even considered by the California Appellate Court or the California Supreme Court, and are not relevant here. The only matters that can properly be considered are whether the California Appellate Court erroneously decided a substantial federal question in dismissing the husband's appeal from the Interlocutory Judgment, and whether the erroneously decided federal ground was necessary to the California Appellate Court's decision to dismiss the appeal.

Factual Background.

The Interlocutory Judgment was entered in the Superior Court in and for the County of Los Angeles, State of California on June 17, 1971. Pursuant to the terms of that Interlocutory Judgment, the husband, petitioner herein, was awarded a total of $17,178 from funds held by Latham & Watkins, attorneys for the wife, respondent herein. The husband was specifically ordered, by the terms of the Interlocutory Judgment, to pay, "forthwith," from the $17,178 he was to receive, attorneys' fees to Latham & Watkins in the sum of $1,000, court costs in the sum of $378, and a $2,200 community obligation of the parties. Subsequent to the entry of the Interlocutory Judgment, the husband demanded that the $17,178 held in trust by Latham & Watkins be immediately paid to him pursuant to the terms of the Interlocutory Judgment. As a result of such demand, on June 23, 1971, a Latham & Watkins attorney delivered the $17,178 to the husband. At that time, according to the sworn declaration which was filed in connection with the original contempt hearing (p. 16 of Appendix B), the Latham & Watkins attorney discussed with the husband the meaning of the word "forthwith" in the Interlocutory Judgment. As that declaration points out, the only reason the money was to be given to the husband first, and was then to be returned in part to Latham & Watkins and to other creditors, was that the husband, himself an attorney, had convinced the trial court judge that he should be permitted, as a matter of dignity, to pay the various obligations directly. For supporting documents, see pp. 11-29 of Appendix B.

After receiving the money, the husband refused to pay the specific community obligation that he had been ordered to pay, refused to pay the attorneys' fees, and refused to pay the court costs. As a result, on July 2, 1971, the wife, through her attorneys, filed an "Order to Show Cause and Declaration in Re Contempt" (p. 12 of Appendix B). On July 19, 1971, after a full hearing, Commissioner Reese of the Superior Court, who had presided over the original hearing on the Interlocutory Judgment, found the husband in contempt of court and ordered him to serve 15 days in jail, but suspended sentence on the condition that he pay the various sums owed the next day.

On July 20, 1971, the husband filed a writ of habeas corpus with the California Appellate Court which issued an order staying the execution of the contempt order. The writ was subsequently denied; the husband then filed a writ with the California Supreme Court, and that writ was denied.

Subsequent thereto, on August 2, 1971, Commissioner Reese ordered the execution of the sentence originally imposed July 19, 1971, and ordered that a bench warrant issue for the apprehension of the husband. The husband then filed various writs and motions attacking that order, including a motion to vacate, all of which were denied.

On July 19, 1971, petitioner filed in the California Appellate Court a notice of appeal from the Interlocutory Judgment. On September 24, 1971, the wife filed a "Notice of Motion to Dismiss an Appeal" (Appendix A), asserting that the husband could not maintain any appeal from the Interlocutory Judgment because he had accepted the benefits of that judgment and because he

was in contempt of the very orders from which he was appealing. After the opportunity for oral argument, the California Appellate Court dismissed the husband's appeal without specifying which one or both of the two grounds asserted by the wife was the basis upon which the motion to dismiss was granted. The husband then filed a petition for hearing (Appendix F) in the California Supreme Court, which was denied, and subsequent thereto, he filed the instant petition for writ of certiorari.

Reasons for Denial of the Writ.

I.

There Is an Adequate and Independent State Ground to Support the State Court Judgment and No Federal Question Has Even Been Raised With Respect Thereto.

The wife, in support of her motion to dismiss before the California Appellate Court, argued that the husband had waived his right to appeal from the Interlocutory Judgment because he had accepted the benefits of that judgment. It has long been established as a matter of California law that a party litigant cannot accept the benefits of a judgment and then appeal from it. In the wife's points and authorities, submitted to the California Appellate Court in support of ner motion to dismiss the husband's appeal, various California cases are cited for that proposition, including a long line of California Supreme Court cases: *Turner v. Markham*, 152 Cal. 246 (1907); *Shubert v. Reich*, 36 Cal. 2d 298 (1950); and *Storke v. Storke*, 132 Cal. 349 (1901) (a divorce case); see pages 7 and 8 of Appendix B. The husband has not contended that the dismissal of his appeal on this ground involves a federal question. Indeed, the husband has failed to even mention this issue in his petition for writ of certiorari.

Being solely a matter of California state law, this ground for the dismissal of the husband's appeal from the Interlocutory Judgment constitutes an adequate state ground to support the dismissal. It is a well-established principle that the Supreme Court will not review a state court judgment based upon a nonfederal ground which is independent of any federal ground and adequate to support the judgment. *Murdock v. Memphis,* 20 Wall. 590, 636 (1875); *Berea College v. Kentucky,* 211 U.S. 45, 53 (1908); *Fox Film Corp. v. Muller,* 296 U.S. 207, 210 (1935); *Herb v. Pitcairn,* 324 U.S. 117, 125-126 (1944). Thus, the order of the California Supreme Court denying the husband's petition for hearing to review the decision of the California Appellate Court's dismissal of the husband's appeal from the Interlocutory Judgment is nonreviewable because there is an adequate and independent state ground to support the state court judgment and no federal question has even been raised with respect thereto.

II.

The Dismissal of the Husband's Appeal From the Interlocutory Judgment Based on His Contempt of Court Does Not Raise Any Substantial Federal Question.

As shown by the points and authorities and various declarations that were before the various California courts, the husband, in essence, demanded that he be given money pursuant to the terms of the Interlocutory Judgment, and once receiving the money, then failed to adhere to the terms of the judgment. If the husband felt aggrieved by the Interlocutory Judgment, he could have appealed without demanding the various moneys held in trust by Latham & Watkins and without put-

ting himself in contempt of Court. He did not choose to do so. Instead, he demanded and received the funds pursuant to the terms of the Interlocutory Judgment and then willfully defied the Interlocutory Judgment. His contempt was upheld by three different courts, including the California Supreme Court. At every stage, the husband was given full opportunity to comply. In fact, even after delaying payment many months, a second judge gave him an additional opportunity to comply, which he chose not to utilize. When petitioner finally agreed to make payment, he had carried out his previous threat and had depleted the funds so that he could not then fully comply. Nevertheless, the husband's contempt sentence was suspended. In the meantime, the wife, in an effort to obtain her final divorce, had moved to dismiss the husband's appeal from the entry of the Interlocutory Judgment. This motion was granted on November 3, 1971 by the California Appellate Court. On November 4, 1971, a hearing was held to determine whether the husband had used his best efforts to pay the remaining amounts which he had been ordered to pay or whether he should be sent *back* to jail. The Court found that he was now using good faith efforts to comply with the Interlocutory Judgment. The Court did not find that the husband had cured his contempt. In fact, to this date, the total amounts that he was ordered to pay on November 4, 1971 still have not been paid in full. Under a long line of California cases, "A party to an action cannot, with right or reason, ask the aid and assistance of a court in hearing his demands while he stands in an attitude of contempt to the legal orders and processes of the courts of the state." *Travis v. Travis,* 89 Cal. App. 2d 292, 293 (1948) quoting *MacPherson v. Mac-*

Pherson, 13 Cal. 2d 271, 277 (1939) (see also cases cited on pages 5 and 6 of Appendix B). This ground for dismissal raises no substantial federal questions, for it was held in *National Union of Marine Cooks & Stewards v. Arnold,* 348 U.S. 37 (1954), that state appellate review is not a requirement of due process and that a state supreme court did not deny an appellant due process where it dismissed an appeal because of appellant's failure to purge itself of contempt. This ground, then, also constitutes an adequate state ground to support the dismissal. There being no substantial federal questions raised by the husband with respect to either of the grounds upon which his appeal was dismissed, justice and equity demand that this petition be speedily denied so that the wife may finally obtain a final decree dissolving her marriage.

III.

If Either Ground Asserted by the Wife in Her Motion to Dismiss the Husband's Appeal Is Adequate to Support the Judgment, the State Court Judgment Is Unreviewable.

The wife moved to dismiss the husband's appeal from the Interlocutory Judgment on two grounds. Neither the California Appellate Court nor the California Supreme Court, however, issued an opinion specifying which of the two grounds urged by the wife was being relied upon in their dismissal of husband's appeal. However, it is well-settled that where the judgment of a state court rests on two grounds, and where there is a state ground independent of any federal question and sufficient to sustain the state court judgment, the Supreme Court will decline to take jurisdiction. *Johnson v. Risk,* 137 U.S. 300 (1890); *Eustis v. Bolles,* 150 U.S. 367 (1893). In *Lynch v. People of New*

York ex rel. Pierson, 293 U.S. 52 (1934), the Court held:

> It is essential to the jurisdiction of this Court in reviewing a decision of a court of a state that it must appear affirmatively from the record, not only that a federal question was presented for decision to the highest court of the state having jurisdiction, but that its decision of the federal question was necessary to the determination of the cause, and that it was actually decided or that the judgment as rendered could not have been given without deciding it. . . . Where the judgment of the state court rests on two grounds, one involving a federal question and the other not, *or if it does not appear upon which of two grounds the judgment was based,* and the ground independent of a federal question is sufficient in itself to sustain it, this Court will not take jurisdiction. (*Id.,* at pp. 54-55) (emphasis supplied).

See also Williams v. Kaiser, 323 U.S. 471, 477 (1945). This is particularly true in view of the long-standing rule that, in the review of judicial proceedings, if the decision below is correct, it must be affirmed, even if the lower court relied upon a wrong ground or gave a wrong reason. *Helvering v. Gowran,* 302 U.S. 238, 245 (1937); *J. E. Riley Inv. Co. v. Commissioner of Internal Revenue,* 311 U.S. 55, 59 (1940); *Securities and Exchange Com. v. Chenery Corp.,* 318 U.S. 80, 88 (1943); *Brown v. Allen,* 344 U.S. 443, 459 (1953), *reh. den.* 345 U.S. 946 (1953). The wife has contended that a dismissal based upon the husband's acceptance of the benefits of the Interlocutory Judgment is purely a matter of the state law

of California and is independent of any federal question involved in this case and is adequate to sustain the judgment. The husband has not contended otherwise. The wife has further contended that a dismissal based on the husband's contempt does not raise any substantial federal question and is also an adequate state ground. Even if the husband had raised substantial federal questions with respect to the contempt ground, however, the existence of an adequate and independent state ground with respect to which no federal question has been raised precludes review of the state court judgment, even though no opinion has been rendered specifying which of the two grounds was being relied upon.

Summary.

The wife moved to dismiss the husband's appeal from the Interlocutory Judgment before the California Appellate Court on two grounds: (1) that the husband waived his right to appeal by accepting the fruits of the judgment and (2) that he could not maintain any appeal because he was in contempt of the very orders from which he appealed. Although neither the California Appellate Court nor the California Supreme Court ever rendered an opinion specifying which of the two grounds was being relied upon, the wife contends that either ground is adequate and sufficient to support the state court judgment. Further, the husband has not here or below presented any federal questions with respect to the first ground, that of acceptance of the benefits, and such ground constitutes an adequate and independent state ground to support the state court judgment. With respect to the wife's second ground, that of the husband's contempt, she contends that no

substantial federal question has been raised. Finally, if either of the two grounds urged by her is correct and is adequate to support the state court judgment, then this petition for writ of certiorari must be denied.

Conclusion.

For the foregoing reasons, it is respectfully submitted that this petition for writ of certiorari be denied.

Dated: June 6, 1972.

Respectfully submitted,

MAX L. GILLAM,
Counsel for Respondent,

COPY

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1972
No. 71-1231

DEAN FRANCIS PACE,

Petitioner,

vs.

MARION ELENA PACE,

Respondent.

On Petition for a Writ of Certiorari to the California Supreme Court.

REPLY BRIEF FOR PETITIONER.

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REPLY BRIEF FOR PETITIONER.

Questions Presented.

1. Are there independent federal questions?
2. Did the California Court of Appeals itself raise federal adjective Due Process questions independent of state grounds?
   a. Did that Court dismiss appeals not within its jurisdiction so as to deny Due Process within prohibitions of the Fourteenth Amendment to the United States Constitution?
   b. Did that Court misapply *National Union v. Arnold,* 348 U.S. 37 (1954) and *Gilfillan v. McKee,* 159 U.S. 303 (1895) to Family Law severable judgments?

3. If the California Court of Appeal dismissed appeals on the state ground of contempt, was that order substantial, sufficient and independent of federal questions invoking the Sixth and Fourteenth Amendments to the United States Constitution, to wit: did the trial court:
   a. Conduct the OSC *re* Contempt as a "motion" and "not as a trial" by a Commissioner who was not an unbiased judge?
   b. Deny the right of confrontation?
   c. Deny time to prepare a defense?
   d. Lack jurisdiction and enforce a judgment void under both federal and state law?
   e. Enforce payment of debt by imprisonment?
4. If the California Court of Appeal dismissed appeals on the state ground of benefit, was that order in violation of California law and *Gilfillan v. McKee,* 159 U.S. 303 (1895) so that it could not be a substantial, sufficient and independent state ground?
   a. Was the "benefit" community property to which Petitioner is entitled by California law?
   b. Would dismissal of appeals on the ground of benefit be in violation of California law, to wit:
   i. Was the act of acquiescence to the benefit "unconditional, voluntary and absolute"?
   ii. Would the appellant be entitled to the benefit in the event of a reversal of the judgment?

iii. Are divorce judgments severable so that a benefit of community property could not support dismissal of appeals challenging the constitutionality of the new California divorce law?

5. Was the California Court of Appeal Order: "Appeals Dismissed," dependent "upon a determination of fact which only a jury could make but which has not been made," *Securities Commission v. Chenery Corporation,* 318 U.S. 80, 88 (1942) in violation of the Fourteenth Amendment to the United States Constitution?

Statement of the Case.

On March 27, 1972, Petitioner filed a petition for a Writ of Certiorari, docketed as Case Number 71-1231. On March 30, 1972, the Clerk advised by letter that "it was directed to the Court of Appeal of California, Second Judicial District, rather than to the Supreme Court of California."

Counsel for Respondent waived the right to file a brief in opposition by letter to the Clerk dated April 7, 1972. On May 10, 1972, the Clerk advised Counsel for Respondent that this Court requested that a response be filed in this case. A Brief for Respondent in Opposition was filed on or about June 6, 1972, which denied that a federal question has been raised, and further, alleged that there is an independent state ground of contempt or acceptance of benefit.

REASONS FOR GRANTING THE WRIT.

1. There Are Independent Federal Questions.

The Brief by Respondent in Opposition did not contest the issues urged in the Petition, but instead, raised the technical issue on the existence of a federal question. In *National Union v. Arnold,* 348 U.S. 37 (1954), this Court held that denial of the right to appeal on the ground of contempt, constitutes a federal question. In the line of cases set forth in 5 L.Ed.2d 889 (1960), this Court further held that denial of the right to appeal on the ground of accepting the benefit of judgment, constitutes a federal question.

Neither the California Supreme Court nor the Court of Appeal delivered an opinion in the instant case but ruled by postcard. In *Durley v. Mayo,* 351 U.S. 277, 281-282 (1956), this Court recited the rule applicable to the circumstance where the highest Court of the state delivers no opinion and it appears that the judgment *might* have rested upon a nonfederal ground.

> But it is likewise well settled that if the independent (state) ground was not a substantial or sufficient one, it will be presumed that the State Court based its judgment on the law raising the Federal question, and this court will then take jurisdiction (citations omitted). *Dudley v. Mayo, supra,* at 281-282.

Petitioner earnestly pleads that this Court should presume that the California Courts based their judgments upon the law raising the federal questions urged in the following Sections 2 through 5 of this Reply Brief.

2. The California Court of Appeals Itself Raised Federal Questions, Independent of State Grounds.

a. The Court of Appeal Dismissed Appeals Not Within Its Jurisdiction so as to Deny Adjective Due Process Within the Prohibitions of the Fourteenth Amendment to the United States Constitution.

The Brief for Respondent in Opposition argues (at page 2) that "the instant petition for writ of certiorari relates solely to the dismissal of petitioner's ("husband's") appeal from the Interlocutory Judgment of Dissolution of Marriage . . ." If that were true, how does Respondent ignore the November 16, 1971 Nunc Pro Tunc order of the California Court of Appeal, Second Appellate District (set forth at Appendix B, page 6 to the Petition herein), to wit:

> THE COURT:
>
> The minute order of November 4, 1972 *dismissing the above entitled case* is corrected "Nunc Pro Tunc" to read as follows: Motion to Dismiss *Appeals* Granted: *Appeals* Dismissed (emphasis added).

The state court not only dismissed all appeals, it dismissed the case. Then Respondent ignored the December 6, 1971 order of the California Court of Appeal (set forth at Appendix B, page 6 of the Petition herein) which denied findings on appeal, and thereby refused to identify or limit the dismissed appeals. If the *nunc pro tunc* order dismissing the case and appeals is to be taken literally, all six pending appeals and all future appeals in Pace v. Pace, [illegible]779053, are dismissed, even though none of the appeals had been certified to the California Court of Appeal and two of the appeals were filed after its *nunc pro tunc* order of November

16, 1971. Thereby, as urged on pages 5-6 of the Petition herein, "The California Court of Appeal Lacked Jurisdiction and Denied Adjective Due Process Within the Prohibitions of the Fourteenth Amendment to the United States Constitution," independent of the state grounds of contempt or benefit.

b. The California Court of Appeal Misapplied National Union v. Arnold, 348 U.S. 37 (1954) and Gilfillan v. McKee, 159 U.S. 303 (1895) to Family Law Severable Judgments.

The dismissal of appeals by the California Court of Appeal is in apparent conflict with the decisions of this Court in *National Union v. Arnold*, 348 U.S. 37 (1954) *re* contempt and *Gilfillan v. McKee*, 159 U.S. 303 (1895) re benefit; and accordingly, raises issues of adjective Due Process under the Fourteenth Amendment to the United States Constitution. Conceding *arguendo* that there were independent state grounds of contempt and benefit, *a fortiori* does that deprive Petitioner:

1. Of all future appeals in perpetuity in Pace v. Pace, D779053, *e.g.*, custody, support and other matters in which the state court retains continuing jurisdiction, and/or
2. Of appeals on severable portions of a judgment, primarily the constitutional validity of the new California divorce law?

The California Supreme Court has frequently held that "the concept of divisible divorce is a part of the public policy of this state." Specifically divisible are "property" and "terminating the marriage relationship," *Lopez v. Lopez*, 63 Cal.2d 735, 737-738; 408 P.2d 744

(1965) and cases cited therein. Thus, it should not be *assumed* that the Court of Appeal Order: "Appeals Dismissed", is valid under California law as to that portion of the judgment which dissolves the marriage, nor valid under California law as to all six appeals dismissed (three civil and three criminal).

Nor is that order valid under federal law, as enunciated by this Court. In *Gilfillan v. McKee*, 159 U.S. 303 (1895), this Court granted an appeal on the ground that a judgment may be severable if a benefit was accepted on a portion thereof. To deprive a Family Law litigant of access of the courts in perpetuity for contempt, would be a significant extension of *National Union v. Arnold*, 348 U.S. 37 (1954) which involved a dollar sum certain and did not consider severable judgments nor Family Law where the state retains continuing jurisdiction. Family Law liberties, *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) are continuously subject to modification by the trial court, and consequently, should be continuously subject to review on appeal.

3. If the California Court of Appeal Dismisses the Case and Appeals on the State Ground of Contempt, Its Order Could Not Be Substantial, Sufficient and Independent of Federal Questions Invoking the Sixth and Fourteenth Amendments to the United States Constitution.

Suffice it to say that the Brief by Respondent in Opposition fails to contest that the trial court:

a. Conducted to OSC *re* Contempt as a "motion" and "not a trial" by a Commissioner who was not an unbiased judge (pages 23-25 of the Petition herein).

b. Denied the right of confrontation (pages 23-25 of the Petition herein).

c. Denied time to prepare a defense (page 26 of the Petition herein).

d. Lacked jurisdiction and enforced a judgment void under both federal and state law (pages 8-15 and 18-22 of the Petition herein).

e. Enforced payment of debt by imprisonment (page 26 of the Petition herein).

By ignoring the errors of the Commissioner at the OSC *re* Contempt, apparently Counsel for Respondent and the California Appellate Courts believe that the errors will go away. Will this Honorable Court hold that there is a sufficient and independent state ground for contempt conviction in the face of flagrant violations of the Sixth and Fourteenth Amendments to the United States Constitution?

Petitioner earnestly submits (at page 28 of the Petition herein) that in *National Union v. Arnold*, 348 U.S. 37 (1954), this Court did not reach the issue of a contempt conviction by the trial court that is "final and conclusive" by the state law: California Code of Civil Procedure, Section 1222 (set forth in Appendix A of the Petition). Indeed, an unscrupulous judge could render "final" any of his judgments by simply issuing a contempt order against a litigant who objects that his judgment was premature, prejudicial and void (pages 19-22 of the Petition herein), thereby precluding appellate review of his judgment in its entirety. It bears emphasis that the inequity of the trial court Commissioner has been aggravated by the unclean hands of Counsel for Respondent, who approaches this Court in

Equity. The Brief for Respondent in Opposition does not deny his breach of stipulation (pages 19-22 of the Petition herein), nor could he for it is a matter of record. Yet that same Counsel sought and obtained from that same Commissioner, imprisonment without appeal, to enforce his stipulation that was altered *ex parte*.

In the Brief in Opposition, Respondent gratuitously alleges (pages 6-7) that Petitioner "could have appealed without demanding the various monies held in trust by Latham & Watkins and without putting himself in contempt of Court." That assertion is diametrically opposed to the argument by Counsel for Respondent in open Court on January 18, 1971 and his stipulation on June 3-4, 1971. Moreover, Petitioner was *ordered* by the Interlocutory Judgment to take community funds and use them to discharge community obligations (as admitted on page 3 of the Brief in Opposition). If Petitioner followed the orders in the Interlocutory Judgment (which he ultimately did), Respondent argues that he "accepted benefits" from the judgment, and thereby forfeits appeal. Conversely, if Petitioner refuses to take the "benefits" of the judgment, he can be found in contempt for not accepting and using the funds as directed; and that contempt, Respondent argues, would also bar his right to appeal. That dilemma violates the Equal Protection of the Law, in that only wealthy husbands with sufficient separate property may preserve their right to appeal by satisfying community debts or by filing a supersedeas bond (in California, one and one-half times the amount of the judgment appealed). Family Law appeals in California, therefore, are discriminatorily available only to independently wealthy husbands, an obvious violation of the Equal

Protection guarantees of the Fourteenth Amendment to the United States Constitution.

The infant daughter of the parties is an implicit party vitally affected by the judicial dissolution of her natural family. *She* has not accepted a "benefit" nor is *she* in contempt. Yet it is undeniable that *she* has an interest in an appellate review of the constitutional validity of state action ordering the dissolution of her parent's marriage.

4. If the California Court of Appeal Dismissed Appeals on the State Ground of Benefit, Was That Order in Violation of California Law and Gilfillan v. McKee, 159 U.S. 303 (1895) so That It Could Not Be a Substantial, Sufficient and Independent State Ground.

a. The Alleged "Benefit" Was Community Property to Which Petitioner Is Entitled by California Law.

In California, the husband has "management and control of the community personal property with like absolute power of disposition," California Civil Code, Section 5125. The power of the husband over community property exists until the entry of a *final* decree, *Harrold v. Harrold,* 43 Cal.2d 77; 271 P.2d 489 (1954); *Vai v. Bank of America,* 56 Cal.2d 329; 364 P.2d 247 (1961).

The "benefit" alleged was "$17,178 from funds held by Latham & Watkins, attorneys for the wife." The $16,427 (not $17,178) was community property as evidenced by the pleas and stipulations of Counsel for Respondent in the trial court record, to wit:

1. At a OSC hearing on January 18, 1971, Counsel for Respondent made a vigorous plea to the trial

court that the family home (in which Petitioner lived alone for five months after his wife deserted him) be sold to pay community debts, and that proceeds be paid to Counsel for Respondent for that purpose. On April 1, 1971, the home was sold and the net proceeds ($23,428 subject to taxes) was paid out of escrow directly to Counsel for Respondent pursuant to the order of the Court. From April through June 23, 1971, Counsel for Respondent repeatedly refused to pay or to release the fund for payment of community debts, and continued that refusal to the interlocutory hearing on June 3, 1971. On June 23, 1971, Counsel for Respondent *asked Petitioner* to take the money to pay community debts so that his client would not be subject to threatened litigation by creditors. On that June 23, 1971, Counsel for Respondent conceded that he had personally inquired of the Clerk of the Superior Court whether the trial court Commissioner had prematurely filed the interlocutory judgment (documented at lines 17-26, page 35 of the July 19, 1971 OSC *re* Contempt transcript of record) so as to render the judgment void under California law (pages 19-22 of the Petition herein). There was extended discussion of motions, appeal and the inability of either party to pay community debts or post bond pending motions or appeal. Whereupon, a compromise was made so that the $16,427 stipulated amount to pay community debts, taxes and other community obligations, would be handed over to Petitioner as manager of the community, without any reference to the Interlocutory Judgment whatsoever (note the lack of any reference to the Interlocutory Judgment in the receipt for the $16,427 prepared by Counsel for Respondent and attached to Respondent's Appendix B at page 29).

2. On June 3-4, 1971, Counsel for Respondent stipulated that the $23,428 fund which it held was community property. Indeed, Counsel for Respondent argued vehemently for the designation of community property so that the fund would not be judged the separate property of Petitioner.

3. On September 25, 1971, nine days before the Interlocutory hearing on June 3-4, 1971, Counsel for Respondent took the deposition of Petitioner, who under subpoena produced records of community debts in excess of the $16,427 received on June 23, 1971.

What is the legal benefit? Petitioner concedes that he also received other community property, including an automobile, royalties, office equipment, furnishings and the clothes on his back. As applied to Family Law, Petitioner earnestly urges that if community property constitutes a benefit, a marital partner would have to go naked in the street in order not to waive the right to appeal.

b. Dismissal of Appeals on the Ground of Benefit Would Be a Violation of California Law.

The Brief for Respondent in Opposition failed to cite the leading California case on acceptance of benefit, *Gudelj v. Gudelj*, 41 Cal.2d 202, 214; 259 P.2d 656 (1953), wherein it was held:

> "It is the settled rule that the voluntary acceptance of the benefit of a judgment or order is a bar to the prosecution of an appeal therefrom." However, "(i)n order to bar the right of appeal on the ground of acquiescence, 'the acts relied upon must be such as to clearly and unmistakably show acquiescence, and it must be *unconditional, voluntary, and absolute.*'" "It is only in cases

where an appellant is shown to have received and accepted advantages from a judgment to which such appellant would not be *entitled in the event of a reversal of the judgment* that her acceptance thereof has been held to operate to defeat the appeal." Otherwise stated, "(w)here the different portions of a judgment are severable, a party by voluntarily accepting the fruits of one portion thereof *does not necessarily estop himself to attack other and severable portions thereof on appeal*" (citations omitted and emphasis added), *Gudelj v. Gudelj, supra* at 214.

Conceding *arguendo* that there was a benefit, Petitioner respectfully submits that none of the conditions of California law, *Gudelj v. Gudelj, supra* at 214, have been fulfilled in the instant case.

i. *The act of acquiescence to the benefit was not "unconditional, voluntary and absolute."*

The $16,427 was not unconditional but was specifically for payment of community debts and taxes (conceded at page 3 of the Brief in Opposition).

The $16,427 was not voluntary in that Petitioner has no other funds (acknowledged repeatedly by Respondent in the record) with which to pay community debts. If the fund had been retained by Counsel for Respondent pending appeal, the community, husband and wife, would have been thrown into litigation and bankruptcy.

The $16,427 was not absolute in that Petitioner was placed in the dilemma of being ordered by the Court to pay community debts but was without the funds to pay them. If he fails to pay them, he is in contempt; if he secures the funds to pay them, he has accepted a

benefit. In a clever legal maneuver, nine days after the $16,427 was delivered to Petitioner, Counsel for Respondent secured an injunction restraining the expenditure of the $16,427, so that both benefit and contempt would be alleged in the OSC *re* Contempt and to the appellate Courts. Petitioner acknowledges that he has been expertly duped.

ii. *Petitioner would be entitled to the benefit in the event of a reversal of the judgment.*

The $16,427 (or $17,178) alleged benefit is a stipulated amount. Unless Counsel for Respondent would renege on his stipulation, Petitioner would be entitled to at least $16,427 or $17,178 in the event of reversal of the Interlocutory Judgment.

iii. *Divorce judgments in California are severable so that a benefit of community property could not support dismissal of appeals challenging the constitutionality of the new California divorce law.*

The California Supreme Court has ruled that "the concept of divisible divorce is a part of the public policy of this state." Specifically divisible are "property" and "terminating the marriage relationship", *Lopez v. Lopez,* 63 Cal.2d 735, 737; 403 P.2d 744 (1965). The only benefit alleged by Respondent relates to $17,178 in community personal property which is severable from the constitutional challenge on the validity of the new California divorce law (pages 8-15 of the Petition herein). Dismissal of six appeals (three civil and three criminal) by the California Court of Appeal on the state ground of benefit, would violate California law, *Gudelj v. Gudelj, supra* at 214, and would be in apparent conflict with the decision of this Court in *Gilfillan v. McFee,* 159 U.S. 303 (1895) with regard to severable judgments.

5. The California Court of Appeal Order: "Appeals Dismissed", Was Dependent "Upon a Determination of Fact Which Only a Jury Could Make but Which Has Not Been Made", in Violation of the Fourteenth Amendment to the United States Constitution.

In *Securities Commission v. Chenery Corporation,* 318 U.S. 80, 88 (1942), cited by Respondent, this Court ruled that the decision of a lower court must be affirmed if the result is correct "although the lower court relied upon a wrong ground or gave a wrong reason" and then held:

> But it is also familiar appellate procedure that where the correctness of the lower court's decision depends upon a determination of fact which only a jury could make but which has not been made, the appellate court cannot take the place of the jury. *Securities Commission v. Chenery Corporation, supra* at 88.

The California Court of Appeal was presented with three *factual* defenses in opposition to Respondent's Motion to Dismiss an Appeal on November 4, 1971. The factual defenses were of sufficient weight that a trial court could not have granted summary judgment.

1. That the contempt, if valid, had been purged.

2. That the declaration by Counsel for Respondent (the only declaration filed) constituted hearsay and/or perjury.

3. That the Interlocutory Judgment was in fact premature, prejudicial and void (a mixed fact-law issue).

On November 4, 1971, the Motion to Dismiss an Appeal was submitted to the California Court of Appeal without the trial court record and without any

hearing by a Master or the Court on the three factual defenses. That same afternoon, the Court of Appeal granted the motion to dismiss. Consequently, in order to act within a matter of hours, the Court of Appeal would have had to depend "upon a determination of fact which only a jury could make but which has not been made", to wit:

1. That the contempt in fact had not been purged (negated by the trial court (the jury or trier of fact) eleven days later, without changed circumstances: ". . . the Court finding that the respondent (Petitioner herein) has made a good faith effort to comply with the Court's order").

2. That the facts in the Moving Party's declaration were accurate, current and complete in compliance with due process: trial, confrontation and cross-examination (which, of course, the Court of Appeal could not do because there was no record).

3. That the stipulation in the Interlocutory Judgment in fact had not been altered *ex parte* or filed prematurely to the prejudice of the appellant and in violation of California law.

How did the California Court of Appeal make its determination? Is it true that the Court of Appeal simply took notice of the certified contempt conviction order of July 19, 1971 by the trial court which is "final and conclusive" under California law (California Code of Civil Procedure, Section 1222 set forth in Appendix A to the Petition herein) and peremptorily dismissed the appeals. If so, its order could not be sufficient and independent of the federal questions invoking the Sixth and Fourteenth Amendments to the United States Constitution (as urged at pages 7-10 of this Reply

Brief). If not, the Court of Appeal would have had to dispose of the three factual defenses as a jury (trier of fact) in violation of *Securities Commission v. Chenery Corporation, supra* at 88.

The dangers of an appellate court acting upon a hodge podge of declarations by counsel, instead of a trial court record, could not be more evident than in the Brief by Respondent in Opposition, which is replete with "clerical" errors, including primarily:

1. Page 7: erroneous citations of the dates of hearings and rulings by the Court.

2. Inclusion of Appendix D (Clerk's Transcript) which is dated by the County Clerk on November 15, 1971, eleven days after the California Court of Appeal order on November 4, 1971. Said Clerk's Transcript was not transmitted to the Clerk of the Court of Appeal until March 8, 1972, and to date, it has not been filed in either the California Court of Appeal or the California Supreme Court.

The ethics of those "clerical" misrepresentations by Counsel for Respondent, shall be entrusted to the conscience of this Court.

Trial by appellate courts based solely upon hearsay declarations, without the trial court record or due process, should constitute one of the most flagrant violations of the Fourteenth Amendment to the United States Constitution.

Conclusion.

The federal questions raised by the practice of the California courts are merely symptomatic in the instant case. The California Family Law Courts have degenerated into a perfunctory attitude toward one of the most fundamental liberties in society. The record will reflect that the Chief Judge of the Los Angeles Family Law Court, on June 3, 1971, asked the rhetorical question whether Petitioner would deny the right of the California Legislature to authorize divorce by mailing a postcard to the County Clerk. The decisions of this Court assure the indicted accused of endless months of trial by jury while in the same courthouse Family Law litigants are begrudged a few hours of the Court's time. In California, it is known as assembly-line justice. Divorce in five minutes. Why? A standardless divorce law. But there is a greater fault, known in California as postcard jurisprudence. Court orders, without reason, create distrust in counsel and litigants alike. Conjecture is substituted for reason. If society in the United States cannot find reason in the judgments of the Courts, how can society be expected to revere the law? "Appeals Dismissed" is the utterance of authoritarian power, devoid of reason. Is it law or authoritarian power that takes a man's liberties without reason, limitation or restraint?

Once again, Petitioner earnestly pleads, on behalf of the social interest, that this Honorable Court take jurisdiction and restore the rule of law, not of men, to Family Law in the State of California.

Dated: September 1, 1972.

Respectfully submitted,

DEAN FRANCIS PACE,
Petitioner.

CERTIORARI DENIED